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No. 91-520

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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VILLAGE OF PALESTINE and  
PATRICK W. SIMMONS,

*Petitioners,*

vs.

INTERSTATE COMMERCE COMMISSION *et al.*,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY TO BRIEF IN OPPOSITION

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DECEMBER 1991

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REPLY TO BRIEF IN OPPOSITION

Petitioners make this reply to contentions concerning petitioners' position first made by the federal respondents in their reply brief. (Resp. 8-11).<sup>1</sup>

It is asserted that these petitioners urge that 49 U.S.C. 10505(a) requires the ICC to consider each factor of the national rail transportation policy, 49 U.S.C. 10101a (RTP), in deciding whether to grant an *exemption* for a line transfer otherwise subject to an *application* proceeding under 49 U.S.C. 11344(d). (Resp. 8). The federal respondents also attribute to petitioners a view that an *exemption* request under 49 U.S.C. 10505(a) might be denied on the basis of a consideration that

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<sup>1</sup>The rail carrier respondents did not submit briefs or present argument in the court of appeals; likewise, they are silent here.

would be completely irrelevant in an *application* proceeding under 49 U.S.C. 11344(d). (Resp. 9). Finally, the federal respondents claim petitioners' position is "peculiar" since, according to the federal respondents, the ICC is barred by law from withholding approval of an application under 49 U.S.C. 11344(d) if the criteria of that subsection are satisfied. (Resp. 10).

1. Petitioners do not claim that ICC must render a positive finding for *each* of the 15 RTP criteria in *every* exemption case. For some criteria, a general finding that "other aspects of the rail transportation policy are not affected adversely" can be entered, which was the ICC's custom until recently. 936 F.2d at 1340. (Pet. 10a). Petitioners argued below that only those aspects of the RTP possibly affected by the line sale need be evaluated in depth. See the opinion below, 936 F.2d at 1339. (Pet. 8a-9a). However, the RTP applies in both *exemption* and *application* cases, to all provisions of the Interstate Commerce Act, as the ICC's ALJ observed. 6 I.C.C.2d at 994. (Pet. 11, 70a).

Thus, petitioners' view of the national RTP is not "peculiar" (Resp. 9) and, contrary to the federal respondents, the ICC is not "barred by law" from considering the RTP in an application case. (Resp. 10). Indeed, the ICC is *required* to consider the RTP criteria in given situations, as recognized in decisions of this Court. (Pet. 15-16).<sup>2</sup>

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<sup>2</sup>The federal respondents assert the decisions below by the court of appeals and agency are consistent with prior agency decisions and other lower courts. (Resp. 10-11). However, even the court below recognized that where the ICC has *granted* an exemption, it has done so in terms of the RTP. No denials were cited. 936 F.2d at 1340. (Pet. 9a-10a). The only known situation, prior to the ICC's August 7, 1990 decision herein, where the agency had limited the role of the RTP, was the isolated *Blackstone* ruling — not material to the outcome of *Blackstone* or mentioned in judicial review. (Pet. 9a n.6) and 6 I.C.C.2d at 1007-8. (Pet. 27a-29a). The three opinions in the D.C. Circuit are not in point, and cannot validly contradict the chain of decisions by this Court in dealing with the national transportation policy, and the RTP. (Pet. 15-17.)

To be sure, a transaction might be denied under an *exemption* request, yet granted in an *application* case, but it is difficult to see such disparity by virtue of the RTP — equally applicable to both methods of procedure. Of course, the terms of the exemption statute, 49 U.S.C. 10505(a), include “market abuse” and “limited scope,” in addition to the RTP (Pet. 3-4, 15a), whereas these other requirements are not directly included in 49 U.S.C. 11344(d).

2. The same misunderstanding concerning petitioners’ position by the federal respondents is indicated in the relationship between “fair wages and safe and suitable working conditions” of the RTP, 49 U.S.C. 10101a(12), and 49 U.S.C. 11344(d). The federal respondents would never have the ICC consider this RTP factor in an application proceeding under 49 U.S.C. 11344(d). (Resp. 11-12). We rely to the contrary upon the seminal decisions of this Court dealing with the national transportation policy. (Pet. 16-17, 19).

Respectfully submitted,

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